82-1078

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JAMES H. BROWN, III, - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

KEVIN MICHAEL McNALLY
Assistant Public Advocate

M. GAIL ROBINSON
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601
(502) 564-5226 or 564-5255
Counsel for Petitioner

December ____, 1982.

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

I.

Does it offend the Sixth and Fourteenth Amendments for a defendant's conviction to be principally based, over vigorous defense objection, on testimony regarding a novel "blood grouping" technique when the Commonwealth makes no showing that the technique has received scientific acceptance and when the Kentucky Supreme Court rejects the *Frye* standard and announces a new rule requiring no threshold showing?

II.

Does it offend the Sixth and Fourteenth Amendments when the trial counsel is denied *any* continuance to prepare to cross-examine a surprise expert testifying about a highly technical and novel "blood grouping" technique?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statues:

Other Authorities:

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PETITION FOR WRIT OF CERTIORARI

Petitioner, James H. Brown, III, respectfully prays that a Writ of Certiorari issue to review the opinion of the Kentucky Supreme Court entered on August 31, 1982.

OPINION BELOW

The opinion of the Supreme Court of Kentucky affirming petitioner's conviction is published. *Brown* v. *Commonwealth,* 639 S. W. 2d 758 (Ky. 1982) (Appendix to Petition, hereinafter A, 21-28).

JURISDICTION

The opinion of the Supreme Court of Kentucky was issued on August 31, 1982, and a timely petition for rehearing was denied November 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution in pertinent part:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution, Section One, in pertinent part:

> . . . nor shall any State deprive any person of . . . liberty . . . without due proces of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was jointly indicted with his brother, Mark M. Brown, in Mason County, Kentucky for the murder of Bryant Dudley (Transcript of State Trial Record, hereinafter TR, 1). The murder allegedly occurred on May 19, 1976 (TR 1). Petitioner promptly filed a discovery motion, requesting "results or reports" of all scientific tests, and the motion was granted (TR 27, 51-53). Several months later, right before trial, the prosecutor read of a new blood test in Playboy magazine (TE 134). He contacted the test's proponent, Robert Shaler, who performed his analysis over the weekend before trial. The prose-

cutor gave Shaler's phone number to defense counsel (TE 135). Counsel called Shaler to determine how to proceed. "I talked to Dr. Shaler, and at that time, he was still unwilling to testify. He said that his results at that time were not conclusive" (TE 135).

Trial began September 27, 1976. There was testimony that Mark Brown had been "ripped off of some drugs" and stated "he knew who had ripped him off and he was going to get them" (TE 3, 5). Mark also said he would "blow their head off" (TE 8). Robert Collins related that he told Mark he saw three people near his house the day of the robbery and Bryant Dudley was one of them (TE 11). Collins, Mark and petitioner picked up Dudley and went riding around; Mark, holding a .45 colt, asked Dudley if he robbed him, and Dudley denied it (TE 11). According to Dudley's girlfriend, the next night, May 18, Mark came and got Dudley so they could "do some chemicals" (TE 18-19). Several witnesses testified that they were at Mark's house that night from about 11:30 to 11:45 p.m. Mark and Dudley were in the kitchen high on drugs. Petitioner was in the living room and was not high. The witnesses left because the others were planning to go to Lexington (TE 21-3, 26-7, 30-2).

Bryant Dudley's body was discovered on a country lane nine days later (TE 34). He had died of two shotgun wounds to the back (TE 118). A police officer related that he talked with petitioner who told him he, Mark and Bryant were at Mark's house until 12:30 a.m. May 19, and then Bryant left and he and Mark went to Lexington. Several people recounted

that petitioner and Mark came to a Lexington apartment early on May 19. Petitioner had been there before and did not appear to be upset (TE 94-105). Petitioner traded boots and shirts with Roy Hutchinson (TE 105-8). Petitioner may have complained about the boots hurting his feet (TE 108). When Hutchinson discovered a stain on the boots, he turned them over to a policeman (TE 107).

Robert Collins testified that several days after Dudley disappeared he and Mark Brown searched for Dudley's body but could not find it. Collins stated that Mark said "he could not remember where it was, where they killed him" (TE 13).

At 10:00 a.m. the second day of trial the prosecutor handed defense counsel a report from Robert Shaler (TE 135). Sometime that day and prior to Shaler's testimony counsel moved for a continuance "of two to three days or, at least, until the next day, so that he could examine Mr. Shaler's report and consult with other experts about the blood testing procedures on which Mr. Shaler relied" (Supplemental Bill of Evidence, A 5). Counsel gave as grounds for his motion that "he could not properly cross-examine Mr. Shaler when he had only received Mr. Shaler's report that morning" (A 5). The colloquy and ruling on the motion:

> MR. GALLENSTEIN: What about my motion as to my being able to cross examine? Do I have to cross examine him this afternoon.
>
> THE COURT: Yes.

MR. GALLENSTEIN: Is there any way that I can proceed with my case, and have him called back? I may have to go to Lexington or go to Cincinnati to find out. I am totally unfamiliar with this.

THE COURT: You may let the record show that the testing was done last Friday, I believe. Is that correct?

DR. SHALER: The testing was conducted throughout the whole weekend. It was initiated on Friday.

THE COURT: Mr. Wood is not familiar with the situation, other than what he has learned. You are not familiar with the situation, other than what you have heard. (TE 135).

Petitioner objected to Shaler's testimony on the ground that the testing methods used by Shaler "are not generally accepted by Courts in the United States" and "the tests and methods are unknown" (TE 128). After conducting a hearing, the court ruled that Shaler could testify (TE 128-134). He then testified at length about the admittedly novel blood grouping theory he used and concluded that the blood on the boots could not have been petitioner's blood (TE 149). Shaler's new technique purported to distinguish various genetic markers (GM) in different blood samples. The analysis was performed on a small stain on the boots which was at least four months old and had not been preserved in any manner. Shaler also stated that the blood on the cutoffs and T-shirt removed from Dudley's body was of the same general type as the blood

on petitioner's boots and that approximately 4.6% of the population has that kind of blood (TE 148-9). This testimony was crucial since both petitioner and Dudley had type A blood (TE 109-113).

The Commonwealth's other evidence consisted of testimony that shot removed from Bryant's body was the same general type as that found in Mark's house and that the shotgun recovered from the Browns' mother's house (or any other 12 gauge, double barreled shotgun) could have fired the shot (TE 57-8, 62-3). Additionally, Jerry Conley, who was in jail with petitioner and Mark after they were arrested, said that Mark had offered him $1000 to kill Robert Collins so he could not testify, and petitioner agreed "with his head" (TE 81-2).

A directed verdict was denied (TE 167). Petitioner then called numerous witnesses who testified regarding his good reputation in the community (TE 170, 171, 172, 173, 174). Petitioner was described as "peaceful" (TE 173), "very quiet, very polite, very considerate" (TE 173), a "nice, polite, quiet young man" (TE 172), and "very peaceful" and "non-violent" (TE 175) by people who knew him well. The defense also called Jerry Muse, a Maysville police officer, who testified that he arrested Jerry Conley for disorderly conduct and public intoxication on July 22, 1976 (TE 177). Gerald Curtis, a police officer and part-time jailor, testified that Mr. Conley was in the jail for about two and a half hours on July 22, and that Mr. Conley's reputation for truth and veracity was "not very good" (TE 178-179).

Petitioner's renewed directed verdict motion was overruled (TE 186). The prosecutor gave a "probability" summation in which he attached random numerical values to the items of alleged "evidence" (most importantly the blood on the boots) and through wild speculation argued the "odds on innocence" as being over one in a billion (TE 199-202). During jury deliberations the foreman asked "[i]f the jury were to find the defendant at the scene but does not think that he shot the shotgun, how does that make the defendant." The question was not answered. Petitioner was convicted of murder and sentenced to twenty years imprisonment (TR 105). Final judgment was entered October 15, 1976 (TR 120).

Petitioner filed a timely Notice of Appeal. However, the Kentucky Supreme Court dismissed his appeal after denying his appointed counsel a second extension of time (principally to research the novel "blood grouping" question). After years of litigation in state and federal court, petitioner's appeal was finally heard by the Kentucky Supreme Court due to a federal court order. *Smith* v. *Brown,* 633 F. 2d 213 (6th Cir. 1980), decided sub nom. *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir. 1980), *cert. denied* 451 U. S. 1008 (1981) (Burger, C. J., Powell, J., dissenting).

Petitioner's conviction was affirmed. The Kentucky Court held that the evidence was sufficient to sustain the jury's verdict, Shaler's testimony was admissible ("the only valid argument to be made against the Shaler evidence is addressable to its credibility

rather than its admissibility") and petitioner was not "unfairly prejudiced" by the trial court's refusal to grant a continuance so that defense counsel could attempt to rebut Shaler's testimony (A 21-28). Petitioner now seeks review by this Court.

REASONS FOR GRANTING THE WRIT

I. This Case Clearly Presents a Question of Great Significance to the Administration of Criminal Justice: Whether the State Must Make Some Threshold Showing of Professional Acceptance of a "Scientific" Test Which It Introduces as the Principal Support for a Defendant's Conviction. The Kentucky Supreme Court's Decision That the Conclusions of any Alleged Expert are Admissible, Regardless of the Degree of Acceptance of His Test Among His Colleagues, Conflicts with the Decisions of Most State and Federal Courts.

A. CLEAR PRESENTATION OF IMPORTANT QUESTION

The issue this Court is asked to review was finely drawn in the courts below. As the trial judge phrased it:

> Mr. Wood, Mr. Gallenstein objects to the admission of Dr. Shaler's testimony on the grounds that the testing methods as used are unknown to Mr. Gallenstein and are not generally accepted by Courts in the United States. On the grounds that the tests and methods are unknown (TE 128).

After conducting a hearing, the court ruled that Shaler could testify (TE 128-134). The court's ruling was based solely on Shaler's assertions that the GM blood grouping test was reliable. No other expert testified, and there were no scientific studies other

than Shaler's unpublished research proposal available to the court. Shaler was being funded by an LEAA grant (TE 137). The whole question of the new technique's applicability to dried blood was ignored.

"Scientific" evidence is appearing more and more frequently in modern courts. As this Court is no doubt aware, there is a "misleading aura of certainty which often envelopes a new scientific test, obscuring its currently experimental nature," *State* v. *Stout*, 478 S. W. 2d 368, 369 (Mo. 1972). Because juries give so much weight to scientific evidence, courts must protect them from exposure to expert testimony of questionable reliability. This Court has not addressed the minimal due process requirements for introduction of "scientific evidence." Increasingly, criminal convictions are based, at least in part, on expert testimony. Because jurors often accept such evidence as infallible, this Court should give guidance to the lower courts about what threshold showing a party in a criminal case must make to admit proof of a scientific nature.

B. THE APPROPRIATE STANDARD—KENTUCKY IS IN CONFLICT WITH OTHER STATE AND FEDERAL COURTS.

The general rule in the United States governing the admissibility of expert testimony based on scientific tests or principles was stated in the leading case of *Frye* v. *United States*, 54 App. D. C. 46, 293 F. 1013, 1014 (1923):

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Some-

> where in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs.* (emphasis added.)

The *Frye* case has been cited by many courts, and is generally recognized as the case establishing the general principles governing the admissibility of new scientific tests. *See, e.g., United States* v. *Addison,* 498 F. 2d 741, 743 (D.C. Cir. 1974); *United States* v. *Stifel,* 433 F. 2d 431 (6th Cir. 1970), *cert. denied* 401 U. S. 994; *Huntingdon* v. *Crowley,* 51 Cal. Rptr. 254, 414 P. 2d 382, 388 (1966); *Commonwealth* v. *Lykus,* 327 N. E. 2d 671, 674 (Mass. 1975); *State* v. *Stout, supra; State* v. *Olderman,* 44 Ohio App. 2d 130, 336 N. E. 2d 442, 448 (1975).

However, the Kentucky Supreme Court has adopted, at least in this case, Dean McCormick's maverick position that "scientific" and other expert opinions should be admitted without regard to whether the alleged "science" has attained general acceptance in its field. McCormick, EVIDENCE 203 (2d ed. 1972). This is contrary to that Court's prior endorsement of the *Frye standard in Conley* v. *Commonwealth,* Ky., 382 S. W. 2d 865, 867 (1967) [polygraph tests] and *Merritt* v. *Commonwealth,* Ky., 386 S. W. 2d 727, 729-30 (1965) [truth serum tests]. The McCormick stand-

ard would permit anyone with a novel theory and some credentials to testify to his "expert" opinion by declaring his theory a reliable science. Obviously, both polygraphs and truth serum tests would be admissible since well qualified experts believe each is highly reliable. No doubt other even more questionable "sciences" would find their way into courtrooms.

The story of "paraffin" and "voiceprint" tests is instructive. Both tests were admitted by lower courts because their proponents, who were apparently qualified "experts" in their fields (like Mr. Shaler,) testified that the tests were reliable. *Commonwealth* v. *Westwood,* 324 Pa. 285, 188 A. 304 (1936); *Trimble* v. *Hedman,* 291 Minn. 442, 192 N. W. 2d 432 (1971). Each test was, like the GM blood test, in its infancy at the time it was admitted into evidence. Each was later discredited by impartial scientists and practitioners in the area. *Brooke* v. *People,* 139 Colo. 388, 339 P. 2d 993 (1959); *People* v. *Kelly,* 17 Cal. 2d 24, 549 P. 2d 1240 (1976).

Several important lessons should be learned from the paraffin and voiceprint debacles. First, no court should depend depend solely on the opinion of an "expert" whose career is dependent on advocating the reliability of his test. *People* v. *Kelly, supra; Commonwealth* v. *Topa,* 471 Pa. 223, 369 A. 2d 1277, 1281 (1977). Second, tests which appear "scientific" and even infallible may in fact be unreliable and invalid. "To discard the 'general acceptance' test for admissibility, as law professor McCormick had argued, might conceivably cause a repeat of the 'paraffin test' catas-

trophe of a few decades ago, where a great number of individuals were convicted on the basis of a 'scientific' test" later revealed to be "so unreliable as not to be usable even for investigative purposes." MOENSSENS, SCIENTIFIC EVIDENCE IN CRIMINAL CASES, SECTION 12.08 at 584 (2d ed. 1978). Third, examination of a new test by impartial experts to determine its validity and to develop standard procedures and qualifications for practitioners *before* the test is given the stamp of judicial approval is essential. *Id.*

Petitioner's argument is not an abstract one based on lofty but impractical legal principles of fundamental fairness. Shaler's crucial conclusion for the jury was that only 4.6 percent of the population, including Dudley, has the type of blood found on petitioner's boots. That conclusion was irresponsible, at best, and starkly demonstrates the danger of relying on one biased man's opinion that his test is reliable. Shaler's conclusion was based on blood sampling conducted on 2000 people in western Pennsylvania. He justified drawing his conclusion from the one sampling because "the caucasian population, as a whole, will have very similar statistics" (TE 160). The problems with his conclusion:

1. The victim was a Negro. Shaler's population statistics were thus irrelevant.

2. GM anitgens vary greatly in different populations and particularly different racial groups.

3. Shaler found that Dudley had GM(4). Only ½ of 1% of Negroes have GM (4).

4. Shaler found Dudley did not have GM (1). Most Negroes have GM (1).[1]

Thus Shaler's "expert" testimony, admitted solely because Shaler assured the judge his test was reliable, was highly questionable. While the *Frye* standard may not be constitutionally required, some threshold showing before admission of scientific evidence is surely mandated by the Due Process Clause. Permitting a witness to testify as an expert and sending a man to prison on the basis of his testimony is fundamentally unfair when the "expert" is the only proponent of his "field." Courts in other states have refused to admit similar blood tests under similar circumstances. *See Huntingdon* v. *Crowley; State* v. *Stout; People* v. *Alston,* 79 Misc. 2d 1077, 362 N.Y.S. 2d 356, 362 (1974). Kentucky's adoption of the McCormick standard in this case is in conflict with the decisions of most state and federal courts. It is also inconsistent with due process and the right to a fair trial. 6th and 14th AMENDS., U. S. CONST. This is an area that cries out for some guidance from this Court. Petitioner requests this Court to grant review and decide whether there in any minimum standard necessary for admitting scientific evidence.

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[1]Blanc *et al., The Value of Gm Typing for Determining the Racial Origin of Blood Stains,* 16 J. FOR. SIC. 176 (1971); Heneberg and Walter, *On the Genetics and Population Genetics of GM(4),* 26 HUM. HERED. 8, 11 (1976).

II. This Case Clearly Presents an Additional Question of Substantial Significance in the Administration of Criminal Justice: Whether Defense Counsel Must Be Granted a Continuance When He is Surprised at Trial by Expert Testimony Regarding a Novel "Blood Grouping Technique. The Decision of the Kentucky Supreme Court Conflicts with the Rationale of This Court's Decision in *Ungar* v. *Sarafite* and the Law in Most, If Not All, Jurisdictions.

Petitioner's defense counsel was forced to cross-examine Robert Shaler after no more preparation than glancing through his report. Shaler's theory was obscure and complex. His explanation of that theory was, to say the least, confusing to the laymen (and, perhaps, to many scientists):

> Q. 42. Just whatever you think will make the jury understand it, doctor.
>
> A. There are two kinds, two different ways to test the blood groups sustances [sic]. There is a direct test and indirect test. The inhibition test is an indirect test. The visualization of the test is positive when the substance is not present. The visualization of the test is negative when the substance is not present. I am sorry. It is negative when the sustance [sic] is present. What we look for in these tests is these red blood cells to come together. So I add a drop of an agent which is very expensive to the cell, to the blood stain or to the blood serum that I want to test, and if the red cells clumb together, in other words, form a mass, then I consider that to be a positive test. A positive test indicates that the substance, the GM Type that I am looking for, is not present. However, if I add my agent to the sample to be ana-

> lyzed, and I do not get the clumping of red blood cells, then that is considered a negative test, and that means the substance that I was looking for is present. So the indirect test is sort of a reversed test, known as an inhibition test. (TE 151-2.)

In spite of defense counsel's pleas for A) two or three days; B) a few hours or C) leave to recall Shaler later, the judge, opining that defense counsel knew as much about the test as the prosecutor, denied any relief. Counsel was compelled to cross-examine Shaler without delay and, for all practical purposes, blind.

Acknowledging that it was "at first somewhat disturbed by the trial court's refusal to grant a continuance in order for defense counsel to research the blood grouping theory," the Kentucky Supreme Court concluded that petitioner was not "unfairly prejudiced" by the denial of time to prepare, apparently because of the Saturday phone call (A 27-28). The Court's comment on the phone call was that "[a]t that time, Dr. Shaler indicated a hesitancy to justify, stating that his results were inconclusive." *Id.* The Court noted that counsel "was aware that Shaler might testify but made no continuance motion until he was called as the last witness and then failed to question him about the Saturday conversation." *Id.* That account of the facts is seriously inaccurate and the burden it places on defense counsel is grossly unfair. Shaler did *not* tell counsel he was *hesitant* to testify. He said he was *unwilling* (TE 135). Apparently, counsel did not hear of *Shaler* again until 10:00 a.m. the second

day of trial. He promptly moved for additional time to prepare to cross-examine Shaler but was overruled. What would the Kentucky court have had petitioner do? Ask for continuance at the beginning of trial because he might have to cross-examine a witness who said he was *unwilling* to testify? The Commonwealth was required by court order to turn over all scientific reports and did not do so until shortly before Shaler testified. If the prosecutor knew before then that Shaler would testify *he* should have informed defense counsel and the court. To place on conscientious defense counsel who was relying on his conversation with Shaler the burden of knowing (speculating?) that Shaler would testify *contrary to what Shaler had told him* is unconscionable. Counsel should not request a continuance until he learned that Shaler had changed his mind. His request for additional time was reasonable, in fact modest.

Petitioner was unquestionably prejudiced by having to cross-examine Shaler unprepared. In their research undersigned counsel have uncovered a wealth of information with which to raise serious questions about the validity of Shaler's tests and to destroy his "4.6 percent" conclusion. Trial counsel had nothing with which to confront the witness. While defense counsel elicited testimony that GM testing was in its infancy in this country, he was unable to score many other crucial points because he did not have the necessary information. The Kentucky Court's opinion gives the green light to prosecutors who wish to spring surprise "experts" on the defense to avoid knowledgeable

cross-examination. That is incompatible with the adversary system and the United States Constitution.

This Court has recognized that the denial of a continuance may be "so arbitrary as to violate due process." *Ungar* v. *Sarafite,* 376 U. S. 575, 589 (1964). The Court condemned "a myopic insistence upon expeditiousness in the face of a justifiable request for delay . . ." *Id.* Petitioner's case represents a gross miscarriage of justice. The Kentucky Court's opinion is inconsistent with the rationale of *Ungar* v. *Sarafite.* It is doubtful that any other jurisdiction would sanction the denial of confrontation and effective assistance of counsel demonstrated by this record. *See, e.g., People* v. *Wilson,* 397 Mich. 76, 243 N. W. 2d 257 (1976). Petitioner requests this Court to review the decision below, give teeth to *Ungar* and resolve the conflict with the law in other jurisdictions.

CONCLUSION

The present case presents two compelling constitutional questions. The administration of justice would benefit from a final resolution of both. For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Supreme Court of Kentucky.

Respectfully submitted,

KEVIN MICHAEL MCNALLY
Assistant Public Advocate

M. GAIL ROBINSON
Assistant Public Advocate
Department of Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601
(502) 564-5255 or 5226

Counsel for Petitioner

No.

IN THE

UNITED STATES SUPREME COURT

October Term, 1982

JAMES H. BROWN, III - - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

CERTIFICATE OF SERVICE

I, M. Gail Robinson, counsel for petitioner, certify that the attached Petition for Writ of Certiorari and Appendix was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C., 20543, and the counsel for respondent, Hon. Steven L. Beshear, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this ____ day of December, 1982, by personally depositing same in a United States mail box, first-class postage prepaid.

M. GAIL ROBINSON
Assistant Public Advocate
Member, Bar of the
United States Supreme Court
Counsel for Petitioner

Subscribed and sworn to before me by M. Gail Robinson, this ____ day of December, 1982.

Notary Public, State at Large

My Commission Expires: _____

SUPREME COURT OF KENTUCKY

JAMES H. BROWN, III, - - - - - - *Appellant,*

v.

COMMONWEALTH OF KENTUCKY, - - - *Appellee.*

Aug. 31, 1982. Rehearing Denied Nov. 2, 1972.

Defendant was convicted in the Mason Circuit Court, Richard L. Hinton, J., of murder, and defendant appealed. The Supreme Court held that: (1) evidence as to victim's last being seen in company of defendant and companion, evidence as to shotgun and shells owned by defendant, as well as other evidence, was sufficient to support murder conviction; (2) expert testimony concerning "GM antigenics" in blood found on defendant's boots, in shooting victim's blood, and in defendant's blood was admissible; (3) record establishes that defendant was not unfairly prejudiced by trial courts refusal to grant continuance; but (4) requirement that presentencing investigation be made, that consideration be given to written report of such investigation, and that defendant or his counsel be informed of facts and conclusions of the investigation and afforded opportunity to controvert them were mandatory and had to precede entry of valid judgment.

Judgment vacated and case remanded for resentencing upon compliance with statute.

1. Homicide—Key 250

Evidence as to victim's last being seen in company of defendant and companion, evidence as to shotgun and

shells owned by defendant, as well as other evidence, was sufficient to support murder conviction.

2. Criminal Law—Key 488

Expert testimony concerning "GM antigenics" in blood found on defendant's boots, in shooting victim's blood, and in defendant's blood was admissible, even though testimony showed that such method of blood-testing was more or less in its infancy and had not yet come into general acceptance and use.

3. Criminal Law—Key 1166(8)

Record established that defendant was not unfairly prejudiced by trial court's refusal to grant continuance to permit defense counsel to research blood-grouping theory upon which prosecution expert witness based his testimony.

4. Criminal Law—Key 986.4(1), 986.5

Requirements that presentencing investigation be made, that consideration be given to written report of such investigation, and that defendant or his counsel be informed of facts and conclusions of the investigation and afforded oportunity to controvert them were mandatory and had to precede entry of valid judgment. KRS 532.050.

Jack Emory Farley, Public Defender, Kevin Michael McNally, M. Gail Robinson, Asst. Public Defenders, Frankfort, for appellant.

Robert F. Stephens, Atty. Gen., J. Gerald Henry, Asst. Atty. Gen., David A. Smith, Sp. Asst. Atty. Gen., Frankfort, for appellee.

OPINION OF THE COURT

The appellant, James H. (Jim) Brown, III, and his brother, Mark Brown, were jointly indicted for the murder

of Bryant Dudley. Cf. KRS 507.020. In a separate trial Mark was found guilty and sentenced to 20 years in prison. His conviction was affirmed by this court in *Brown* v. *Commonwealth*, Ky., 555 S. W. 2d 252 (1972). That opinion will serve as a sufficient background for understanding this case without a detailed account of the evidence in this opinion.

Jim Brown's separate trial also resulted in a verdict of guilty and a sentence of 20 years' imprisonment, which gives rise to this belated appeal.

With two major differences the evidence in Jim's trial was much the same as it was in Mark's. Mark was done in by the testimony of Robert Collins, who said that Mark had confided in him and admitted that he and Jim had killed Dudley. This evidence, of course, was not admissible against Jim. In Jim's trial, on the other hand, there was expert evidence that blood found on Jim's boots was not his blood but could have been Dudley's. That evidence was not introduced in Mark's trial.

To summarize the events, it will be recalled that Mark strongly suspected that Dudley had stolen a quantity of marijuana from his apartment in Maysville, and was threatening to shoot him. On the night of Monday, May 17, 1976, Jim, Mark and Robert Collins went riding in Jim's automobile and picked Dudley up. As they continued riding around with Jim driving, Mark displayed a .45-caliber pistol and, pointing it in the "general direction" of Dudley, questioned him with regard to the theft of drugs from Mark's apartment. Collins became apprehensive and asked that he be taken back to his car, which was done. When Collins parted company with them, Mark, Jim and Dudley were still together. On the next night. Tuesday, May 18, 1976, Jim and Mark were in Jim's car on 4th Street in Maysville and indicated to Chan Warner and Earl Black that they were looking for Dudley. Shortly thereafter

they found him at the home of his girl friend, Anna Corde, and he left with them in Jim's car. Later on, between 11:30 and midnight, four boys came to Mark's apartment but stayed only a few minutes because the Browns were planning to go to Lexington. Dudley was in the kitchen with Mark "snorting something" and appeared to be "high." Jim, on the other hand, was sitting on a chair in the living room and appeared to be normal. So far as we know from the evidence, this was the last time anyone other than Jim and Mark Brown saw Dudley alive.

At 3:00 or 3:30 in the morning (Wednesday, May 19, 1976) Jim and Mark arrived at the apartment of several friends in Lexington, Kentucky, about 65 miles from Maysville, and went to bed on a couch. Wednesday was Jim's usual off-day from work, and he had made similar visits on several occasions, usually arriving, however, on Tuesday evening. Mark had not accompanied him before. Later on during this particular day, after the Brown boys had arisen they played cards and listened to records with some of their hosts, after which Mark cleaned out Jim's car and disposed of some trash. During this activity Mark fired a shotgun which he or Jim, had in the automobile, explaining afterward that he had been testing a defective safety mechanism. Sometime in the middle of the day, around noon or 1:00 P.M., Jim, Mark and a young man named Hutchison went over to Hutchison's nearby apartment and Jim asked Hutchison if he wanted to buy a pair of boots. Hutchison said no, but that he had an old pair he would trade for them. Jim thereupon traded his boots for the old boots, and also traded the shirt he was wearing for one of Hutchison's shirts. According to Hutchison, Jim gave no explanation for wanting to make these exchanges. Later, however, after Hutchison began to hear rumors (after discovery of the murder, presumably) he took a good look at the boots, which he had not worn,

and discovered a stain or stains on them. Eventually, after being questioned by investigative officers, Hutchison turned the boots over to a detective. A laboratory examination disclosed the presence of Type A human blood stains on the boots. Both Jim Brown and Dudley had Type A blood.

In the early morning hours before daylight on Saturday, May 23, 1976, Mark and Robert Collins borrowed an automobile and went out to the scene of the crime for the purpose of burying Dudley's body, but were unable to locate it. According to Collins, Mark "could not remember where it was, where they killed him." Jim Brown did not take part in this expedition.

On May 27 Dudley's badly-decomposed body was found by the side of a country lane near Maysville. His death had resulted from two side-by-side shotgun wounds in the back. It was established that these wounds had been inflicted by No. 6-size shot fired from a .12-gauge shotgun. Pieces of wadding recovered from the body were identified as having come from Federal brand shotgun shells. Jim Brown owned a double-barreled .12-gauge Stevens shotgun that was capable of firing both barrels simultaneously. It had a defective safety device. There were some Federal .12-gauge shells in his mother's home, where he resided. Blood from various objects recovered at the death scene was of Type A. Tire marks indicating where an automobile had recently stopped were similar to the treads on the tires of Jim Brown's automobile.

[1] It is our opinion that the evidence thus far summarized was sufficient to justify the conviction of Jim Brown in the killing of Dudley at some time during the interval of three hours or so from the departure of the four visitors from Mark's apartment between 11:30 P.M. and midnight on Tuesday, May 18, upon the arrival of Mark ind Jim in Lexington at 3:00 or 3:30 in the morning of Wednesday, May 19. There was further testimony by

one Conley, who had been in jail with the Browns in July of 1976 after being arrested for public intoxication, to the effect that they offered him $1,000 to kill Robert Collins, but we do not need to rely upon it in reaching our conclusion with regard to the sufficiency of the evidence to warrant the conviction Brown was not entitled to a directed verdict of acquittal. Cf. *Trowel* v. *Commonwealth*, Ky., 550 S. W. 2d 530, 532 (1977).

[2] It is insisted with much vigor that the trial court committed prejudicial error in admitting expert opinion testimony from Robert Shaler, PhD, a research assistant professor at the University of Pittsburgh, reflecting his conclusions with reference to blood samples drawn from Jim Brown as compared with the blood stains on his boots and with blood stains on the victim's clothing. In addtion to a doctorate in bio-chemistry. Dr. Shaler had taken graduate training in forensic science, had served for several years as a criminologist and research director at the Pittsburgh and Allegheny County Crime Laboratory, and since 1974 had been engaged in an LEAA-financed project to study the individualization of blood stains.

The method used by Dr. Shaler in comparing and differentiating blood samples depended on the identification of certain genetic factors in the blood. It is premised upon the existence of 23 "GM antigenics," some but not necessarily all of which will be consistently present in the serum of an individual person's blood. The laboratory in which Dr. Shaler worked had the capability of identifying three of these, which he designated as GM Nos. 1, 4 and 12. Only No. 4 was found to be present in the blood from Jim Brown's boots and the blood from Dudley's clothing, whereas the blood-sample drawn from Jim Brown contained both No. 4 and No. 12. Hence the presence of No. 12 served to differentiate Jim Brown's blood from that found on his boots and in Dudley's clothing. It was possible, there-

fore, that the blood on the boots came from Dudley, but not possible that it came from Brown. Testifying in chambers prior to the admission of this testimony before the jury, Dr. Shaler explained the development of the GM system and gave his professional opinion that it is reliable. Though counsel for Brown was at some disadvantage in having had a limited time to prepare himself on the subject, he conducted a skillful and penetrating cross-examination in the presence of the jury which was well-calculated to make the point that this particular method of blood-testing is more or less in its infancy in this country and has not yet come into general acceptance and use.

Our opinion is that the only valid argument to be made against the Shaler evidence is addressable to its credibility rather than its admissibility. "Any relevant conclusions which are supported by a qualified expert witness should be received unless there are other reasons for exclusion." McCormick, *Evidence,* 203 (2d ed. 1972). It is not to be likened to the lie-detector test, the results of which depend heavily on the skill of the operator, and in which factors other than truthfulness are known to affect the result. Dr. Shaler's testimony was admissible on the same basis as any other expert opinion.

[3] We were at first somewhat disturbed by the trial court's refusal to grant a continuance in order for defense counsel to reserch the blood-grouping theory. Defense counsel spoke with Dr. Shaler on Saturday before the trial commenced on Monday. At that time, Dr. Shaler indicated a hesitancy to testify, stating that his tests were inconclusive. He had been contacted by the Commonwealth only on Friday, and continued testing throughout the weekend. Defense counsel was certainly aware that he might testify, yet made no motion for a continuance until the Commonwealth called Shaler as its last witness. Moreover, when presented with the opportunity during cross-examination,

defense counsel failed to question Shaler about the doubts expressed in the Saturday conversation. We cannot conclude that Jim Brown was unfairly prejudiced by the trial court's refusal to grant a continuance.

[4] We find no merit in the remaining issues related to the conduct of the trial. However, one procedural exercise remains. KRS 532.050 requires a presentencing investigation and consideration of a written report of such investigation. The trial court is required also to inform the defendant or his counsel of the facts and conclusions of the investigation and afford him opportunity to controvert them. The record does not disclose whether an investigation or report was requested or considered. The requirement is mandatory and must precede the entry of a valid judgment. *Brewer* v. *Commonwealth*, Ky., 550 S. W. 2d 474 (1977).

The judgment is vacated and the case remanded to the Mason Circuit Court for resentencing upon compliance with KRS 532.050.

All concur except STEPHENS, J., not sitting.

MASON CIRCUIT COURT

Indictment No. 16-76

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

JAMES H. BROWN, III - - - - - *Defendant*

SUPPLEMENTAL BILL OF EVIDENCE

It is hereby stipulated and agreed by and between Woodson T. Wood, Commonwealth Attorney, and Robert I. Gallenstein, counsel for James H. Brown III, that an oral motion for a continuance made by Mr. Gallenstein was erroneously omitted from the transcript of the trial proceedings. Prior to the commencement of Robert Charles Shaler's testimony before the jury, Mr. Gallenstein approached the bench and moved for a continuance of two to three days or, at least, until the next day, so that he could examine Mr. Shaler's report and consult with other experts about the blood testing procedures on which Mr. Shaler relied. Mr. Gallenstein gave as grounds for his motion that he could not properly cross-examine Mr. Shaler when he had only received Mr. Shaler's report that morning. Thus, when on page 135 of the Transcript of Evidence Mr. Gallenstein referred to his motion about cross-examining the witness and asked whether he had to cross-examine him that afternoon, the motion to which he referred was the oral motion for a continuance.

(s) Woodson T. Wood
Woodson T. Wood
Commonwealth Attorney

(s) Robert I. Gallinstein
Robert I. Gallenstein
Attorney for Defendant

No. 82-1078

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

JAMES H. BROWN III - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494
(502) 564-4044
Counsel of Record for Respondent

WESTERFIELD-SONTE CO., 618 W. KENTUCKY—P.O. BOX 8881, LOUISVILLE, KY.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

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v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

OBJECTION TO JURISDICTION

Petitioner invokes jurisdiction of this court under 28 U.S.C. § 1254(1). Respondent denies such assertion of jurisdiction, as Section 1254 applies only to cases in the courts of appeals of the United States. Petitioner is seeking review of an opinion of the Supreme Court of Kentucky.

Respondent further submits that the questions presented to this court neither specifically nor explicitly conform to Rule 17 of this Court. Furthermore, respondent submits that petitioner's question 1 was not presented to the Kentucky courts in the form or context presented here, and respondent also submits that

petitioner's question 2 does not involve a *novel* blood grouping technique; neither does it involve a timely request for continuance.

PREFACE TO COUNTERSTATEMENT OF THE CASE AND TO ARGUMENT

Petitioner Brown constantly has been in federal habeas corpus courts since October, 1977, in the aftermath of his 1976 conviction for murder in Kentucky's Mason Circuit Court.[1] At no time in that nearly 5½ year period has he ever claimed in any federal court—until now—that he suffered Constitutional deprivation at his 1976 state-court trial.

His attack heretofore has been only in regard to Constitutional deprivation on state appeal from that trial, not in his trial itself. Furthermore, he has refused to attack any part of that trial as Constitution-

[1]In *Brown* v. *Hinton*, No. 77-141, United States District Court for the Eastern District of Kentucky, at Covington; *Brown* v. *Smith*, No. 79-3589, United States Court of Appeals for the Sixth Circuit, decided *sub nomine* at *Cleaver* v. *Bordenkircher*, 634 F. 2d 1010, at 1012 (6th Cir. 1980), and *Smith* v. *Brown*, cert. den. in this Court's case No. 80-1277, on March 18, 1981, two justices favoring certiorari. The United States District Court deliberately retained the action on its docket until Brown's petition for habeas corpus finally was dismissed by order of December 27, 1982, or after the pendency of this action in this Court. Petitioner's state appeal from the murder conviction was dismissed by the Supreme Court of Kentucky because of errors of appellate counsel in not timely filing the appeal, Memorandum of the United States District Court, No. 77-141, dated August 31, 1979. Federal courts ultimately found the dismissal of the appeal to be unconstitutional, and the Supreme Court of Kentucky reinstated the appeal. That court's affirmance of petitioner's trial conviction now is the basis of the petition for writ of certiorari.

ally defective in the context of persistent notice and mention by officers of the Commonwealth of Kentucky of this failure and refusal of petitioner to assert any available claims of trial error while in the various federal habeas corpus courts.

Thus, petitioner Brown's failure and refusal in federal court for nearly 5½ years was not because he did not think of the matter. Rather, it was a deliberate and knowing choice and decision not to attack his trial conviction in federal habeas corpus courts on Constitutional grounds. Now, for the first time, after nearly 5½ years of federal court litigation and an affirmance in the Supreme Court of Kentucky of Brown's trial conviction, petitioner most belatedly has decided it is now in his interest to make federal-court Constitutional claims about his state trial court conviction. Respondent Commonwealth of Kentucky sees no good reason to reward such deliberate delay. Respondent Commonwealth of Kentucky sees no reasonable justification for petitioner's refusal to raise all available Constitutional claims relative to his conviction while in the federal habeas corpus courts for more than five years.

COUNTERSTATEMENT OF THE CASE

Respondent does not accept the petitioner's statement of the case.

Petitioner Brown and his brother, Mark, were jointly indicted by the Mason County Grand Jury for

the murder, on May 19, 1976, of Bryant Victor Dudley[2] (TR 1).[3] Following jury trial, petitioner was convicted of the murder and received a penalty of 20 years of imprisonment.

Chan Warner testified that immediately before May 19, 1976, he saw petitioner and petitioner's brother, Mark. Mark said his house had been broken into, that drugs had been stolen, and that he knew who had done it and that Mark was going to get them. Mark was looking for the victim (TE 5).

Mark and petitioner were in petitioner's car (TE 6).

Steve Lofton testified that shortly before May 19, 1976, Mark told him, "Man, I have been ripped off, and when I find out who done it, I am going to blow their head off." (TE 8).

Robert Collins testified that Mark told him of the break-in (TE 10), and that Collins thereupon related he had seen the victim right beside his house during that time (TE 11). Mark told Collins $1,000 in drugs had been taken (TE 11). Petitioner was present when these things were told (TE 11).

Collins testified that later he was riding with petitioner, Mark and the victim when the two Browns questioned the victim about the break-in, with Mark doing most of the asking (TE 11-12). Mark had a .45

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[2]The appellate report of Mark's separate trial and conviction may be found at *Brown* v. *Commonwealth*, Ky., 555 S. W. 2d 252 (1977).

[3]Citations are to the transcript of record (TR) or transcript of evidence (TE) at the 1976 trial in Mason Circuit Court.

in his hand (TE 11), pointing the automatic pistol in the victim's direction (TE 12).

Collins asked to be taken back to his car, and he was (TE 12). The others were still together (TE 12).

Collins later learned that the victim was missing, and he and Mark went to Morton's Lane, Mark saying he wanted to look for the victim's body (TE 12). This was sometime in the night or morning (TE 12).

Collins and Mark looked for the body just off the side of the road, just up in the weeds (TE 13). The body was not found (TE 13). Mark told Collins that Mark could not remember where the body was, where they killed him (TE 13).

Collins bought marijuana from Mark (TE 13).

Collins testified that when he and Mark went to look for the victim's body, they took shovels to bury it (TE 16).

Collins testified that the .45 pistol he sold was not the same .45 which Mark had before the victim was shot (TE 18). Mark told him the first pistol was buried or gone (TE 17).

Anna Corde, the victim's girlfriend, testified that the victim told her he was going with petitioner and Mark the night of May 18, 1976 to their house (TE 19).

Ms. Corde testified that Mark came to her house to get the victim and that the victim told her he was going with Mark and petitioner (TE 19). The victim had stayed outside with Mark and petitioner about five minutes before leaving (TE 19). The victim was wearing a pair of cut-off jeans and a tee-shirt. Before

leaving, he put long jeans on over the cut-offs, and put on a pair of gym shoes (TE 19).

Steve Bowles testified that he saw petitioner, Mark, and the victim the night of May 18, 1976, at Mark's house between 11:30-12:00 (TE 21-22). Mark and the victim were high but petitioner was not (TE 22). These three were in the apartment when Bowles left (TE 23).

Craig Allen Burrows also testified that Mark, petitioner and the victim were together at this time (TE 26-27).

So did Mike Crawford, who testified that petitioner's condition was okay (TE 31-32).

William P. Lewis, a Kentucky State Police detective (TE 33), investigated Dudley's killing. A body was found in Morton Lane Road May 27, 1976 (TE 34). That body was the victim, Dudley (TE 34).

The body was across a fence, covered by weeds and briars (TE 34). Found at the scene were two wool socks, a paper towel with blood on it, a tireprint and two .45 caliber casings (TE 34). Gravel and dirt were collected near a bloody area (TE 39).

The body had a tee-shirt, and a pair of cut-offs down below the knees (TE 37). A pair of Levi's also was found at the base of a walnut tree (TE 38). Also found was a pair of tennis shoes (TE 38). These articles of clothing correspond with what Anna Corde said the victim was wearing when he left with petitioner (TE 19). A plaster cast of the tireprint which was found (TE 71) and tire markings showed that the

print could have been made by petitioner's car (TE 115).

The detective also obtained a 12-gauge shotgun belonging to petitioner from Robert Poe (TE 42-43). Shells in the gun, which was double-barreled, do not automatically eject when fired but stay in it until the gun is broken down (TE 43). A pump or automatic shotgun does eject shells (TE 43).

The detective also received three live and one spent shells from Mr. Poe (TE 44).

Detective Lewis' investigation led him to believe Dudley's death occurred on Morton Lane Road (TE 52).

During the trial, the trial court found that petitioner had examined the Commonwealth's files (TE 56).

Ralph Gramke, a Cincinnati policeman assigned to the coroner's office, testified that Dudley had been killed with a 12-gauge shotgun (TE 57).

Gramke testified that petitioner's shotgun was in firing order, but had a defective safety device (TE 59).

James A. Brell, Mason County Coroner, testified that the victim's body was badly decomposed when found May 27, 1976 (TE 70).

Jerry Conley testified that he was in jail with petitioner and Mark after they were arrested in connection with Dudley's death (TE 81). The three of them had a conversation concerning the victim and the trials (TE 81). Conley testified that Mark and petitioner offered Conley $1,000 to kill Robert Collins so he

wouldn't testify (TE 81). Mark made the verbal statement, and petitioner agreed with Mark (TE 81). Both petitioner and Mark were simultaneously present (TE 81). They wanted Robert Collins dead so he couldn't testify (TE 81). This occurred in July 1976, when Conley was in jail for public intoxication (TE 81-82). Conley testified that petitioner and Mark said their mother would pay him (TE 82). They also told Conley to use a gun (TE 83). Conley had been arrested for intoxication. However, that charge later was dismissed (TE 178-179).

Robert Poe was a family friend (TE 84). He received petitioner's shotgun from Christine Brown (TE 86). She is petitioner's mother (TE 88). Under questioning by petitioner's attorney, Mrs. Brown said she was not attempting to hide the gun from lawful authority (TE 93).

David Kearns, who lived at Lexington, testified that petitioner and Mark appeared at his apartment on the morning of May 19, 1976, arriving at about 3:00 or 3:30 (TE 98). They came in petitioner's car (TE 97). Petitioner had stayed there before, but Mark never had (TE 99). Petitioner usually arrived at around 7:00 p.m. when he came previously (TE 99).

David Wise, who lived in Lexington, testified that Mark, on that occasion, later went outside and a loud blast that sounded like a gun was heard. When Mark returned, he said he was checking the safety on a gun and that it went off (TE 101).

Roy Hutchinson, who lived in Lexington, testified that on May 19, 1976 (later on the day of the murder),

petitioner asked him if he wanted to buy a pair of boots (TE 106). Hutchinson had no money to buy boots, and petitioner told Hutchinson, "if I had a pair of boots or shoes or something that he would trade me." (TE 106).

So, they traded boots (TE 106).

Petitioner had a shirt with a hole toward the bottom and he asked for a shirt to wear, which Hutchinson provided (TE 107). Photographic exhibits of the murder scene show a barbed wire fence (photos are in back of state TE Volume 2).

Upon learning of Dudley's death and hearing rumors, Hutchinson noticed a stain on the boots petitioner traded to him (TE 107). He had never worn the boots except to try them on and they had stayed in his closet (TE 107). He gave the boots to Jerry Muse (TE 108).

William Schrand, a criminalist with the Hamilton County Coroner's Office, testified that he found human bloodstains on both boots (TE 112). He saw the boots at an earlier trial in Mason Circuit Court (TE 112).

Schrand testified that he examined a plaster cast and four tires and found one element on the cast that could have been produced by the tires (TE 114-115).

Dr. Paul N. Jolly, chief deputy coroner of Hamilton County, testified Dudley's body was markedly decomposed (TE 117). The back of the body had two shotgun entrance wounds (TE 118). Because of decomposition, their exact size could not be determined precisely (TE 118). This was the cause of death (TE 118). Dr. Jolly said death could have occurred as

recently as seven days prior to his examination, but probably a little longer (TE 119). He examined the body on May 28, 1976 (TE 117). The wound in the body would cause significant external blood loss (TE 120).

Jerry Muse, a Maysville policeman, testified that he obtained the boots exhibited in court from Roy Hutchinson's apartment in Lexington (TE 121).

William Lewis testified the four car tires came from petitioner's car (TE 126).

Robert Charles Shaler, examined out of the jury's presence (TE 128), testified that his tests of the evidence submitted to him are very similar to blood grouping tests, the difference being that the blood groups he uses are not commonly known to laymen (TE 129). Those groups, which he identified as Gm groups, are very stable in dry blood, and they occur in high concentration (TE 129). Shaler testified that "there are 23 different kinds of Gm groups. That is, 23 different kinds that we are able to analyze for routinely." However, he had available reagents to test for only three groups (TE 129). The test he made, known as an inhibition test, is a very common method for grouping blood (TE 129).

Shaler had testified only once previously—in a homicide case—about this method (TE 130). Shaler stated that while that homicide case is the first time the method was used in homicide cases, the particular tests are used routinely for paternity testing (TE 130).

Shaler, when asked by petitioner's trial attorney whether there is anything published to show the va-

lidity of the test in the United States, answered yes, that he had given the name of the book by telephone to petitioner's counsel (TE 131).

Shaler testified that Gm grouping throughout the world is commonly accepted. All Shaler has done, he said, is to take what has been done and apply it to identification of dry blood (TE 131). The tests Shaler conducted simply indicated the presence or absence of certain Gm groups (TE 132). He said there is no linkage relationship between Type A blood and Gm grouping, and that is why it is valuable (TE 132).

England and France have used Gm testing for quite a while (TE 134). Shaler could not test the blood sample for racial type, because he did not have the needed agents when he did the testing (TE 157-158).

Petitioner's trial counsel told the court he spoke to Shaler by telephone two days earlier (TE 134).

The prosecutor told the court he received copies of Shaler's test only that morning and gave a copy to petitioner's trial counsel almost immediately (TE 135). The prosecutor also informed petitioner's trial counsel as soon as word from Shaler was received by telephone (TE 134). Shaler had initiated the tests only on Friday (TE 135).

Petitioner's trial counsel did not question admitting Shaler's tests into testimony, but his ability to cross-examine was placed at issue (TE 136).

Before the jury, Shaler testified he received the boots in evidence for examination, plus other clothing and blood drawn from petitioner (TE 137). He de-

scribed his procedure for differentiating blood samples by identifying genetic factors (TE 138).

His identity test was one that could be viably used on old blood stains even up to 22 years later (TE 139). Also, his test may be successfully used without the presence of a large blood stain (TE 139).

Shaler said much like a person is or is not blood group A, then he is or is not a particular Gm group (TE 140).

Shaler's tests showed that the blood on the boots in question could not have come from petitioner (TE 148). It is impossible, he added (TE 149). Shaler said the blood on the boots possibly could be the victim's (TE 149).

Shaler said the Gm system comes from the blood's serum, as opposed to its solid content (TE 151). The Gm test analyzed immunoglobins which are in very high concentration and thus the test is very sensitive (TE 151).

On cross-examination, Shaler stated he had given a copy of his unpublished article to petitioner's trial counsel (TE 153).

Though unpublished, the paper was presented at the American Academy of Forensic Sciences in February, 1976 (TE 153). The paper also has been reviewed by numerous forensic serologists, the F.B.I., Scotland Yard, and has been accepted by them for publication (TE 153).

Shaler acknowledged that statistical/population blood sample studies would be more accurate if they could be sampled for each specific geographical area

of population. However, general studies of population blood sample frequencies are accurate to two percentage points (TE 155).

Shaler also testified that all he was doing was narrowing down the number of people whose blood the sample could be (TE 160).

Shaler testified he could not say the blood on the boots was the victim's (TE 161).

Shaler was a biochemist working in blood characteristics, as well as a forensic serologist (TE 165).

On redirect examination, Shaler testified that the Gm factor test is very much used in non-homicide cases in the United States (TE 165-166).

No objection was made to any part of the prosecutor's closing summation.

After going into deliberation, the jury returned and questioned the trial court (TE 203). The jury asked to hear the oath they swore as jurors and the oath they swore to be picked as jurors (TE 203). The oaths were read to them (TE 203).

Petitioner made no motion for continuance at the beginning of trial (TE "B"). Nor did he move for continuance at the beginning of the next day of trial (TE 93-94).

Petitioner's brother, Mark, did not testify.

ARGUMENT

1. The Question Presented Here Was Not Asserted at Trial or Upon Appeal. Its Belated Presentation Here Should be Rejected. Further, the Complained-About Blood Grouping System Is Not Novel, as Petitioner Asserts. It Is Medically and Scientifically Known and Accepted.

Petitioner urges this Court to find from the facts that the Gm blood grouping system used at his murder trial is "novel," that it is without scientific acceptance, that under such circumstances the respondent at trial had a duty to make a threshold showing of professional acceptance of the Gm system before relying upon it at trial, and that the blood grouping test was the principal support of his conviction.

As will be demonstrated, however, the Gm blood grouping system is not novel but well known, and in fact enjoys solid medical and scientific acceptance and reliance. More importantly, neither at Kentucky trial nor appeal did petitioner ever present the question he raises here as to any duty of threshold showing. The facts show much other support for conviction. And as noted in the preface, in more than five years of litigation in federal habeas corpus courts petitioner never raised any claim of any kind of Constitutional deprivation at his murder trial.

At trial, petitioner objected to Dr. Shaler's testimony on the ground that his tests were *unknown* (TE 128). At appeal, he argued that "there is no evidence *either* in the record *or* in the scientific community" that the Gm grouping used by Dr. Shaler is reliable.

Petitioner at trial did not challenge Dr. Shaler's credentials. Neither did he specifically challenge the bulk of Dr. Shaler's findings.

Finally, in urging this Court to embrace the test of *Frye* v. *United States,* 293 F. 2d 1013 (1923), and then apply it to this state case, petitioner concedes that "the *Frye* standard may not be constitutionally required." Petition at page 13.

Because of all this, respondent submits that this Court should reject petitioner's invitation. This Court has proclaimed its duty to dismiss a certiorari upon discovering that the question which induced issuance of the writ does not arise in the record of the trial court. *Tyrrell* v. *District of Columbia,* 243 U. S. 1, at 6 (1917). The omission being known earlier gives even greater reason to deny the petition.

All that the Gm blood grouping tests did, as a scientific and medical matter, was to parallel the same conclusion which would come to a reasonable man engaged in the use of common sense. That is, both processes tended to show that the blood in question on the boots was not petitioner's blood and that it could have been the victim's.

The common sense finding of this reality is as follows: Petitioner for no clearly articulated reason, almost immediately after the murder, arranged to trade his bloodstained boots for clean boots. There is no evidence showing bleeding by petitioner. There is no evidence showing bleeding by anyone except the murder victim. Simultaneously, petitioner also arranged to trade his torn shirt. The victim's body when

found was lying across a barbed wire fence. By common sense logic, petitioner was demonstrating knowledge that the blood on the boots was not his blood.

So either method of inquiry, without the other, excluded petitioner's blood on the boots, and pointed to the *possibility* that the blood on the boots was the victim's blood.

So the bloodstained boots, under either method of inquiry, simply tended to corroborate the other evidence of petitioner's whereabouts at the time of the murder.

Having said that, respondent will now cite medical and scientific evidence that the quarter-century-old Gm blood grouping system is highly reliable. Inasmuch as this authority concurs in every regard with Dr. Shaler's trial testimony, a further summary of Dr. Shaler's testimony at trial will first be set forth.

Shaler, a biochemist and forensic serologist, received his doctorate degree in biochemistry from Pennsylvania State University and received further graduate training in forensic science at the University of Pittsburgh. Thereafter, he was criminologist and research director at the Pittsburgh and Allegheny County Crime Laboratory. At time of trial, he was research assistant professor and assistant professor of forensic chemistry at the University of Pittsburgh (TE 136).

Dr. Shaler testified that he was asked to examine certain items to try and determine if the blood of either the victim or petitioner was on them (TE 138). His scientific intent was to use tests to identify genetic fac-

tors in blood which allow differentiation of samples of blood (TE 138). The tests work upon inherited properties in the blood, or antigens (TE 151). Both the victim and petitioner proved to have type A blood (TE 138). Shaler then was confronted with two realities. Could further distinction be made? Could it be made with the furnished blood samples? Usually, the age of blood is very important (TE 139). Since he didn't have fresh blood, he turned to the Gm system. The Gm system is good for very old blood—many years old, in fact. It occurs in high concentrations and thus the serologist needs very little blood for his sampling purposes (TE 139). And a person either has Gm, or he doesn't (TE 140). That is, there is no middle ground.

Gm factors are found in blood serum, and are very stable in dried blood (TE 129), and provide a very sensitive test (TE 151). There are 23 Gm groups which can be tested for routinely, Dr. Shaler testified (TE 129). Testing is known as inhibition testing (TE 129). Further, there is no relationship between A and Gm blood factors (TE 132). Here, he tested for three of those Gm groups (TE 140). Based upon his tests, he determined that the blood on petitioner's boots was not petitioner's—that was impossible (TE 148). That is, petitioner was excluded as having that particular blood grouping. (Shaler had been given a blood sample taken from petitioner).

On the other hand, the blood on the boots matched the blood on the victim's clothing. Therefore, the blood on the boots *possibly* was the victim's blood (TE 149).

The victim did not have Gm 12 blood; petitioner did (TE 148-150).

Dr. Shaler said Gm blood testing has been in use since the 1950s, particularly in other countries (TE 133, 152). Such testing is routinely done in paternity testing, he testified (TE 130). However, he personally was unaware of much prior use of it in homicide cases (TE 130, 156).

Dr. Shaler attributed its greater use in other countries to the relatively slow growth of forensic science in the United States (TE 134). Furthermore, the needed testing agents at time of trial had to be obtained in Europe (TE 150), and he had on hand the kinds to allow only the three Gm group tests.

Dr. Shaler stated that all the scientific-medical communities are trying to do is narrow down the possibilities, or to exclude, as to whose blood is involved (TE 160).

The literature endorses the Gm system's reliability and validity, and agrees in all regards with Dr. Shaler's testimonial accuracy.

In Vol. 2 of *Clinical Diagnosis and Management by Laboratory Methods,* 16th ed., by John Bernard Henry, M.D. (1979), we are told at p. 1519 that "of the many proteins present in the serum," the Gm genetic markers are one of the groups "most commonly tested" for paternity. Further, at p. 1526, "Testing genetic markers of immunoglobulins (Gm) is based on the principles of passive hemagglutination inhibition."

16 *Journal of Forensic Sciences,* by M. Blanc, R. Gortz and J. Ducos (1971) states:

> Many investigations have since confirmed the value of the Gm system for the examination of dried blood stains. The antigens are numerous, they are stable for years, and the test requires only a small amount of stain for very clear and specific inhibitions.
>
> * * *
>
> The tests for Gm antigens have yielded significant results for the identification of small stains and of old ones. In fact, these determinations have been applied several times in forensic medicine investigations, and the findings have proved decisive in some instances. (p. 176).

The Gm testing is so good for old blood, the Journal noted, that it easily allows postponement of the tests to await any possible new developments in the case.

> When a blood stain is found * * * it is usually advisable to postpone the test for Gm antigens and wait for developments in order not to use up a stain which might be needed later on. Because the Gm antigens are stable in dried blood stains, an analysis made later will be as reliable as one made on a fresher stain. (pp. 177-178).

The Journal concluded at p. 181:

> Tests for Gm antigens in dried blood stains should be made part of the routine practice in forensic medicine. The identification of Gm antigens is as reliable as that of many erythrocytic antigens, and the tests can be carried out on smaller stains. The tests increase the number of detectable characteristics and thus increase the precision of individual identifications * * *.

6 *Forensic Science* (1975), at pp. 89-90 discloses that Gm testing is so routine in Europe that authors Bozena Turowska and Franciszek Trela of the Institute of Forensic Medicine, Academy of Medicine, Cracow, even looked for and found Gm capability in the inner ears of cadavers. They found that if blood cannot be gotten from cadavers, then endolymph from the cadavers' inner ears is just as good for Gm testing purposes. No difficulties or anomolies were found.

11 *Forensic Science* (1978), at p. 109 reports that specified Gm groups can be determined in blood stains 29 to 33 years old, leading to the obvious conclusion that Gm is very stable in dried blood.

The authors, who were affiliated with a university laboratory in Belgium, happened to come across bloodstains dating from 1943 and 1947, and they tested them.

They concluded that an easy way to store blood samples for court uses, so that a report could still be drawn up years after the fact, simply would be to make a stain on a cotton tissue.

So routine does Gm testing appear to be elsewhere that in 11 *Forensic Science* (1978) at p. 41, two members of the Metropolitan Police Forensic Science Laboratory in London, reported that, in a real pinch, where there is insufficient material for separate and independent grouping, the same piece of bloodstained *thread* may be used for Gm or Km, *and* ABO group testing.

In 16 *Medicine, Science and the Law* (1976), three members of the same Scotland Yard laboratory conclude, at p. 43:

> In overall terms of sensitivity, durability and statistical significance, the Gm system is only surpassed by the ABO system.
>
> This is true, they stated, even though
>
> the Gm group system was first reported by Grubb and also by Grubb and Laurell in 1956. At that state only one antigen had been recognized * * *. Since then, the Gm system has been shown to be one of great complexity and a large number of antigens have been reported.

The authors stated that "Gm typing in relation to paternity is well established and has been in routine use for many years."

A reading of these authorities will show that much work has been done in other countries, and will impress that these matters are taken matter-of-factly and are reported in an apparently routine manner. Gm also will be seen as but one of a large and expanding number of blood grouping/typing tests.

In fact, Gm testing just for paternity had been done in at least 13-22 countries by 1974 or 1975, according to 9 *Family Law Quarterly*, pp. 615, 624 (1975).

In *Blood Grouping Test*, Sussman (1968) p. 116 and *Hereditary Gammaglobulin Groups in Man*, Ciba Foundation Symposium on the *Biochemistry of Human Genetics*, Grubb, R. (1959) p. 246 states that tests have corroborated the hereditary nature of the Gm property.

In 13 *Journal of Family Law* 713, which discusses blood test exclusion procedures in paternity cases, the Gm group is specifically recognized at page 749 as

dealing with serum protein blood factors. It is classed as a major blood group (p. 743).

The Journal of Family Law article concludes at pages 751-752 by stating that the Gm grouping test is one of a number of grouping systems that can presently be adopted for legal application.

The article was prepared with the assistance of specified medical authority. See footnote at page 713.

There is substantial agreement that blood grouping test results are admissible in evidence in criminal prosecutions on the question of whether particular blood was the blood of a specified individual. 46 A.L.R. 2d 1000, § 11 at p. 1025. This annotation is a discussion regarding blood grouping tests.

Thus, it is clear that authority supports the truth of Shaler's professional work, and supports the propriety of introducing Gm results in the present case. It is not new or unknown.

Shaler's own work, of course, had been examined and accepted by eminent law enforcement authority, including the F.B.I. and Scotland Yard (TE 153).

Petitioner tries to undermine Dr. Shaler by citing to Henneberg and Walter on the frequency of Gm^4 in Negroid blood. No matter what the frequency percentage of occurrence, of course, some people will have it and some will not. The frequency may vary from pure Negroid to mixed Negroid. However, petitioner stops short of calling Shaler wrong. And it must be recognized that Shaler at trial acknowledged that frequency sampling of the area of the crime, not else-

where, would be best (TE 155). The jury heard his testimony.

Thus, contrary to petitioner's claim that Gm is unknown and unreliable, there is abundant evidence both of record and within the scientific-medical community that the blood testing used is valid, reliable and accepted. Both Dr. Shaler and the scientific-medical community support each other as to the reliability and acceptance of Gm testing.

More to the point, these authorities corroborate the common sense analysis of petitioner's spontaneous and immediate trading of his bloodstained boots and torn shirt. Petitioner even without the Gm typing, knew his own blood was not on the boots. So knowing, he told the world this fact far more effectively than the Gm testing did. The conviction was proper. The petition here should be denied.

2. Petitioner Was Not Surprised at Trial by Dr. Shaler's Testimony. Neither Was the Gm Blood Grouping a Novel System. Further, Petitioner Delayed Until Almost the Last Minute to Seek a Continuance.

Petitioner claims that he was surprised *at trial* by Dr. Shaler's expert testimony regarding a *novel* blood grouping system.

As has been demonstrated, however, the Gm blood grouping system is not novel. Rather, it is well known, accepted and relied upon by both the medical and scientific communities.

Furthermore, Dr. Shaler's impending arrival was known to petitioner *before trial,* Dr. Shaler gave scien-

tific/medical references about Gm to petitioner *before trial,* and then petitioner waited until almost the end of the prosecution's case *at trial* to seek a continuance for the first time. Under such circumstances, the trial court acted properly within its discretion.

Petitioner's trial counsel knew of Dr. Shaler's writings in the Journal of Forensic Science (TE 131). Shaler had given counsel the name of a reference book by telephone (TE 131). Counsel had talked to Shaler by telephone before trial (TE 134). The prosecutor informed petitioner's counsel of Shaler's findings as quickly as they were known (TE 135).

While petitioner's trial counsel, after talking to Shaler, found that Shaler was then unwilling to testify because at that time his tests were ongoing and not conclusive (TE 135), the correct view is that had Shaler in fact been unwilling to testify, it would have been useless for him to give Gm references to petitioner's counsel by telephone before trial. Dr. Shaler testified *in chambers* that he gave such Gm references to counsel before trial, and this was not disputed (TE 131). Neither has petitioner ever alleged any sort of bad faith by the prosecution.

Given the great length of the *voir dire,* which is not reported in the record but which may be gathered from the prospective juror list at TR 86-90, it is apparent that petitioner could have sought a continuance before the jury was sworn and before even one witness had appeared. Yet no such motion can be found in the record. Instead, petitioner waited until the Commonwealth had presented almost all of its case before seek-

ing a continuance. Further, it appears that petitioner's passing comment here that failure to get a continuance denied him effective assistance of counsel also is a first-time claim in any court.

Under these circumstances, deference to the trial judge's discretion is appropriate, as petitioner's own authority, *Ungar* v. *Sarafite,* 376 U. S. 575 (1964), states. The petition should be denied.

CONCLUSION

For the foregoing reasons and authority, respondent Commonwealth of Kentucky respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

J. GERALD HENRY
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601-3494
Counsel of Record for Respondent

CERTIFICATE AND PROOF OF SERVICE AND OF MAILING FOR FILING

I hereby certify that three copies of this Brief in Opposition to Petition for Writ of Certiorari were served upon petitioner by depositing them in a United States mailbox facility with first-class postage prepaid, addressed to Mr. Kevin Michael McNally, Ms. M. Gail Robinson, Assistant Public Advocates, State Office Building Annex, Frankfort, Kentucky 40601, this 17 day of February, 1983. All parties required to be served have been served. Forty copies of this Brief in Opposition to the Petition have been mailed for filing in this Court, addressed to the Clerk of this Court, on the same date and by the same method.

J. GERALD HENRY
Counsel of Record for Respondent